

BEFORE THE
Federal Communications Commission
 WASHINGTON, D.C.

In re Applications of)	MM Docket No. 94-10
)	
The Lutheran Church-Missouri Synod)	File Nos. BR-890929VC
)	BRH-890929VB
For Renewal of Licenses)	
of Stations KFUA/KFUA-FM)	
Clayton, Missouri)	

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To: The Commission

SEP 19 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**MOTION FOR STAY OF EEO REPORTING REQUIREMENT**

The Lutheran Church-Missouri Synod (the "Church"), by its attorneys and pursuant to Section 1.43 of the Commission's rules, hereby moves for a stay pending appeal of the Equal Employment Opportunity ("EEO") reporting requirement imposed by the Commission in The Lutheran Church/Missouri Synod (Memorandum Opinion and Order), 12 FCC Rcd 2152, ¶ 29 (1997) (the MO&O). Unless a stay is granted, the MO&O requires the Church to file an EEO monitoring report on October 1, 1997, concerning the Church's affirmative action efforts and minority and female hiring results for both full and part-time positions at its radio stations, KFUA(AM) and KFUA-FM (sometimes collectively referred to as "KFUA" or the "Stations").

The ground for this motion is that the Church will suffer irreparable injury to its First Amendment rights if it is required to file a report in which it will have to make judgments -- subject to FCC scrutiny and second-guessing -- as to which job functions at KFUA are sufficiently religious to warrant an exemption from the FCC's strictures against religious discrimination under the ruling in the MO&O. Moreover, the Church is likely to succeed on

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the merits of its arguments in its appeal to the United States Court of Appeals for the District of Columbia Circuit that the MO&O violates the Religious Freedom Restoration Act, the First and Fifth Amendments to the Constitution and is arbitrary and capricious. There is no prospect that others will be harmed if the Commission grants the stay, and the public interest favors grant of the stay to protect the Church's Constitutional rights during the pendency of the appeal. A stay of the EEO reporting requirement pending appeal is therefore appropriate.

BACKGROUND

1. In the MO&O, the Commission concluded that the Church had violated the affirmative action provisions of the FCC's EEO Rule, 47 C.F.R. § 73.2080 (1997) (the "EEO Rule") and imposed EEO reporting requirements as a sanction. The Commission found that KFUE had not engaged in any discrimination and that KFUE's statistical record of employment did not raise any inference of discrimination. KFUE had written antidiscrimination and affirmative action policies and sought minority applicants and hired minorities by using a variety of religious and secular referral sources. Nonetheless, the Commission ruled that there were EEO violations because the Church had given preferential hiring treatment to individuals with knowledge of Lutheran doctrine for positions at KFUE that the Government deemed were not reasonably connected with espousal of the Church's religious views over the air, thereby violating the FCC's ruling in King's Garden, Inc., 38 F.C.C. 2d 339 (1972), aff'd, King's Garden, Inc. v. FCC, 498 F.2d 51 (1974) ("King's Garden"). The Commission also concluded that the Church violated the FCC's affirmative action requirements for two and one-half years of the seven year license period because KFUE solicited the assistance of likely sources of minority

referrals on an “irregular” basis and had not engaged in continual “self-evaluation” of the success of its minority recruitment policies as compared to the availability of minorities in the labor market.

2. The Church has appealed to the United States Court of Appeals for the District of Columbia Circuit, pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b), from the rulings that it violated any valid EEO requirement and from the EEO reporting requirements.^{1/} In its Brief in the Court of Appeals, a copy of which is appended hereto as Exhibit 1, the Church shows that the MO&O’s conclusion that the Commission has the authority to second-guess the Church’s judgments as to which jobs at KFUE are important to its religious mission and therefore warrant religious preferences, and the EEO monitoring reports that will be used by the Commission to do this second-guessing, violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b) (“RFRA”) and the Free Exercise Clause of the First Amendment. The MO&O substantially burdens the Church’s religiously motivated communicative conduct in a fashion that is not narrowly tailored to serve any compelling governmental interest.

3. The Church also shows in its Brief that the ruling in the MO&O limiting the Church’s rights to use religious preferences to jobs that meet FCC approval violates the Establishment Clause of the First Amendment by excessively entangling the Government in a continuing process of testing and evaluating religious matters. Moreover, the MO&O

^{1/} The Lutheran Church-Missouri Synod v. FCC, No. 97-1116 (D.C. Cir.), filed and docketed on March 3, 1997. In its appeal, the Church also urges the Court to reject as arbitrary and capricious the Commission’s conclusion that the Church lacked candor and the forfeiture imposed on that ground.

discriminates against religious broadcasters on the basis of their viewpoints in violation of the Free Speech and Free Exercise Clauses of the First Amendment because it prohibits discrimination only on the basis of religious viewpoints and not on the basis of other viewpoints or categories of speech.

4. In addition, the Church shows in its Brief that if it is the FCC's position that a broad religious exemption modeled on Section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (1972), is inconsistent with the premise of the Commission's EEO Rule, the FCC's application of its EEO Rule to the Church violates the Equal Protection Clause of the Fifth Amendment. The FCC cannot show that there is a compelling state interest in refusing to allow the Church to prefer applicants with Lutheran knowledge in order to comply with the FCC's affirmative action requirements. Moreover, the FCC's ruling is arbitrary and capricious because it applies the King's Garden "policy" limiting the right of religious organizations to prefer candidates with religious knowledge, adopted in a 1972 letter ruling, without reexamining the basic propositions undergirding the ruling.

ARGUMENT

5. In determining whether a stay is warranted, the Commission must consider: (1) whether the Church will suffer irreparable harm if a stay is not granted; (2) whether the Church is likely to prevail on the merits; (3) whether other interested parties will be harmed if the stay is granted; and (4) whether the public interest favors the grant of a stay. See, e.g. General Telephone Company of California, 8 FCC Rcd 8753 (1993), citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-674 (D.C.Cir. 1985); Washington Metropolitan Area Transit

Authority v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). The test is flexible one -- a stay may issue if the arguments for one factor are particularly strong, even if the arguments in other areas are not as strong. Cityfed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995). The Church need not establish that it has an absolute certainty of success on the merits of its appeal. Population Institute v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). The Commission is not required to accept the Church's arguments that the MO&O was wrong -- it "may grant a stay even though its own approach may be contrary to movant's view of the merits." Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d at 843. "[I]t will ordinarily be enough that the [petitioner] has raised questions going to the merits, so serious, substantial, difficult and doubtful so as to make them a fair ground for litigation and thus for more deliberative investigation." Id. at 844, quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (Frank, J.).

6. Under this standard, there can be no doubt that the Church is entitled to a stay pending appeal of the MO&O's requirement that the Church file an EEO report on October 1, 1997. The EEO monitoring report impairs the free exercise rights of the Church and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). The filing of the report substantially burdens the Church's decisions concerning how best to organize itself to serve its religious mission by requiring the Church to make judgments as to whether each position at KFUE is "related to the espousal of religious views over-the-air" and therefore

possibly exempt in the FCC's view. The Church must then subject its judgments to FCC scrutiny and second-guessing concerning whether the Church was correct about its own religious needs.

7. The EEO report is a substantial burden on the Church's exercise of religion because it necessarily affects the way the Church carries out its religious mission. As Justice White, writing for the majority in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"), put it:

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Amos, 483 U.S. at 336 (citation omitted). Justice White's comments about courts and judges apply with equal, if not greater, force to agencies and their staff. Similarly, in his concurrence in Amos, Justice Brennan prophesied that substantial constitutional burdens would result from agency second-guessing of church decisions as to which personnel were important or "integral" to its religious mission:

[T]his prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation.

Amos, 483 U.S. at 343-44 (Brennan, J., concurring). The EEO monitoring reports imposed in

the MO&O result in precisely the constitutionally improper chilling effects and interference in the Church's process of self-definition that Justice Brennan described. And as noted above, the impairment of the Church's First Amendment rights is in itself irreparable injury. Elrod v. Burns, 427 U.S. at 373.

8. The Church is also likely to prevail on the merits of its appeal. At the very minimum, the Church's Brief in the Court of Appeals certainly "raise[s] questions going to the merits, so serious, substantial, difficult and doubtful so as to make them a fair ground for litigation and thus for more deliberative investigation." Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d at 844. As noted above and shown in the appended Brief, the Church has raised a *number* of serious Constitutional and statutory challenges to the MO&O, including: (1) that the EEO reports violate RFRA and the Free Exercise Clause of the First Amendment by substantially burdening the Church's religiously motivated communicative conduct in a fashion that is not narrowly tailored to serve any compelling governmental interest, see Amos, 483 U.S. 327, EEOC v. Catholic Univ. of America, 83 F.3d 455 (D.C. Cir. 1996); (2) that the rulings in the MO&O violate the Establishment Clause of the First Amendment by excessively entangling the Government in a continuing process of testing and evaluating religious matters, id.; (3) that the MO&O discriminates against religious broadcasters on the basis of their viewpoints in violation of the Free Speech and Free Exercise Clauses of the First Amendment because it prohibits discrimination only on the basis of religious viewpoints and not on the basis of other viewpoints or categories of speech, Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445, 2458-59, reh'g denied, 512 U.S. 1278 (1994); and (4) that if it is the FCC's

position that a broad religious exemption modeled on Section 702 of Title VII of the Civil Rights Act of 1964 is inconsistent with the premise of the Commission's EEO Rule, the FCC's application of its EEO Rule to the Church violates the Equal Protection Clause of the Fifth Amendment, Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995).

9. A stay of the EEO reporting requirement pending the Court of Appeals' decision on the merits of the Church's appeal will not harm other interested persons' interests in any significant way. Indeed, the Church does not understand how there could be *any* harm to others from a stay of the reporting requirements while the Church's appeal is decided. It should be noted that this is not a case where there has been a showing that would support a claim that there is a threat that a licensee may engage in discrimination. Rather, the ALJ found:

The findings establish[] that no individual was discriminated against by the Stations because of race, color, religion, national origin, or sex. There is not one scintilla of evidence in the record to indicate that any adverse discriminatory act ever occurred, or that any individual ever even made an allegation of racial or other discrimination regarding the Stations' employment practices.

And both the Review Board and the Commission have affirmed this finding.

10. Finally, the public interest clearly favors the grant of a stay of the substantial constitutional burdens on the Church's religious conduct resulting from the EEO reports. This will permit the Court of Appeals to consider whether the Commission can require such monitoring reports consistent with RFRA and the Church's Constitutional rights.

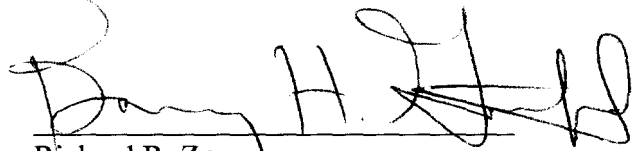
CONCLUSION

A stay is appropriate where, as here, "a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the [stay] would inflict irreparable injury on the movant." Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d at 844. For all the reasons shown above, the Commission should grant the requested stay.^{2/}

Respectfully submitted,

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Dated: September 19, 1997

^{2/} If the Commission denies this motion, the Church requests a stay *pendente lite* in order to seek a stay in the Court of Appeals.

SCHEDULED FOR ORAL ARGUMENT JANUARY 12, 1998

In the
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 97-1116
Consolidated with No. 97-1115

THE LUTHERAN CHURCH - MISSOURI SYNOD,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from the Federal Communications Commission

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Dated: September 8, 1997

SCHEDULED FOR ORAL ARGUMENT JANUARY 12, 1998.

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1116
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Appellant.

v.

FEDERAL COMMUNICATIONS COMMISSION.

Appellee.

On Appeal From the Federal Communications Commission

**BRIEF FOR APPELLANT,
THE LUTHERAN CHURCH - MISSOURI SYNOD**

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Lutheran Church-Missouri Synod (the "Church"), the appellant in Case No. 97-1116, pursuant to Rule 28(a)(1) of this Court, hereby submits this certificate of counsel as to parties, rulings and related cases:

A. PARTIES AND AMICI

1. The following are all parties who have appeared before the Federal Communications Commission in the previous phases of this proceeding, MM Docket No. 94-10:

- The Lutheran Church-Missouri Synod:

- Mass Media Bureau of the Federal Communications Commission; and
- Missouri State Conference of Branches of the NAACP, St. Louis Branch of the NAACP, and St. Louis County Branch of the NAACP.

The Church certifies that the following are all persons who are parties, intervenors or amici in the consolidated cases in this Court:

- The Lutheran Church-Missouri Synod;
- Office of the General Counsel, Federal Communications Commission;
- Missouri State Conference of Branches of the NAACP, St. Louis Branch of the NAACP, and St. Louis County Branch of the NAACP;
- American Center for Law and Justice (amicus on behalf of the Church);
- Center for Individual Rights (amicus on behalf of the Church); and
- National Religious Broadcasters (amicus on behalf of the Church).

2. The Church has the following affiliates (as defined in Rule 26.1(a) of the Court)

which have issued debt securities to the public:

- Lutheran Church Extension Fund - Missouri Synod;
- California-Nevada-Hawaii District Church Extension Fund;
- The Central Illinois District Church Extension Fund;
- The Church Extension Board of the Michigan District of The Lutheran Church - Missouri-Synod;
- The Ohio District Lutheran Church Extension Fund, Inc.; and
- The Church Extension Funds of the following entities:
 - * Iowa District East of The Lutheran Church - Missouri Synod;
 - * Iowa District West of The Lutheran Church - Missouri Synod;
 - * South Dakota District of The Lutheran Church - Missouri Synod;
 - * Southern District of The Lutheran Church - Missouri Synod; and
 - * Texas District of The Lutheran Church - Missouri Synod.

The general nature and purpose of all of these Church extension funds is to lend funds to congregations of the Church and to other eligible synodical borrowers. Loans are made for site acquisition, construction and renovation of facilities for worship, education and other purposes that serve to further the religious, educational and charitable purposes of the Church. Funds for the loans are obtained by the regular issuance of general obligation notes by the above-listed entities.

The notes are secured and are issued to Church congregations, individual members of the Church, and to other synodical investors.

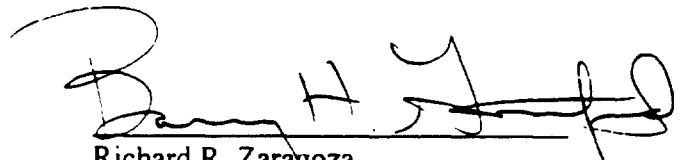
B. RULINGS UNDER REVIEW

The ruling under review in this case is The Lutheran Church/Missouri Synod (Memorandum Opinion and Order), 12 FCC Rcd 2152 (1997), released January 31, 1997.

C. RELATED CASES

The case on review has not previously been before this Court or any other court. The Church is unaware of any other related cases currently pending in this Court or in any other court other than the consolidated case, Missouri State Conference of Branches of the NAACP, Case No. 1115.

Respectfully Submitted.



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Dated: September 8, 1997

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* Cases and materials marked with an asterisk are those principally relied upon.

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* United States Constitution, amend. I	<i>passim</i>
* United States Constitution, amend. V	<i>passim</i>

* Cases and materials marked with an asterisk are those principally relied upon.

SCHEDULED FOR ORAL ARGUMENT JANUARY 12, 1998

In the
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 97-1116
Consolidated with No. 97-1115

THE LUTHERAN CHURCH - MISSOURI SYNOD.

Appellant.

v.

FEDERAL COMMUNICATIONS COMMISSION.

Appellee.

ON APPEAL FROM THE
FEDERAL COMMUNICATIONS COMMISSION

**BRIEF FOR APPELLANT,
THE LUTHERAN CHURCH - MISSOURI SYNOD**

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal by the Lutheran Church-Missouri Synod (the "Church") pursuant to Section 402(b) of the Communications Act of 1934, as amended. 47 U.S.C. § 402(b) (1988 & Supp. V 1993). The Church filed a timely appeal on March 3, 1997 from the decision of the Federal Communications Commission (the "FCC" or the "Commission"), released on January 31, 1997, granting the Church's license renewal applications for radio stations KFUD(AM) and KFUD-FM, Clayton, Missouri ("KFUD" or the "Stations" when referred to jointly), but concluding that certain EEO related violations had occurred that warranted the imposition of EEO reporting requirements and assessing a \$25,000 forfeiture. The Lutheran Church/Missouri Synod (Memorandum Opinion and Order), 12 FCC Rcd 2152 (1997) (the "MO&O"). J.A. ____.

STATEMENT OF THE ISSUES

1. Did the MO&O violate the Religious Freedom Restoration Act and the Church's rights under the Free Exercise and Establishment Clauses of the First Amendment by arrogating to the Government the right to determine which job functions at the Church's Stations need religious hiring preferences?
2. Did the MO&O discriminate against religious broadcasters in violation of the Free Speech and Free Exercise Clauses of the First Amendment?
3. Did the FCC's application of its affirmative action requirements to the Church violate the Fifth Amendment by prohibiting the Church from using religious preferences while requiring the Church to be conscious of race in its employment actions?

4. Did the FCC act arbitrarily and capriciously in failing to reexamine the premises of its 25 year old ruling limiting the use of religious hiring preferences by religious organizations?

5. Was the MO&O arbitrary and capricious in holding that a forfeiture should be imposed on the Church because former counsel's use of the word "required" rather than "preferred" in an argument allegedly "lacked candor"?

STATEMENT OF THE CASE

A. The Commission's Decision

In the MO&O, the FCC renewed the Church's licenses for KFUE, but concluded that the Church had violated the FCC's Equal Employment Opportunity ("EEO") Rule, 47 C.F.R. § 73.2080 (1997) (the "EEO Rule"), imposed "EEO reporting" requirements, and assessed a \$25,000 forfeiture for a purported lack of candor. The Commission found that KFUE had not engaged in any discrimination and that KFUE's statistical record of employment did not raise any inference of discrimination. MO&O ¶ 17. KFUE had written antidiscrimination and affirmative action policies (ID ¶¶ 42-43) and had sought minority applicants and hired minorities by using a variety of religious and secular referral sources. ID ¶¶ 76, 79, 82, 88, 91, 120, 126, 130. Nonetheless, the Commission ruled that there were EEO violations because the Church had given preferential hiring treatment to individuals with knowledge of Lutheran doctrine for positions at KFUE that the Government deemed were not reasonably connected with espousal of the Church's religious views over the air, thereby violating the FCC's ruling in King's Garden, Inc., 38 F.C.C. 2d 339 (1972), aff'd, King's Garden, Inc. v. FCC, 498 F.2d 51

(1974) ("King's Garden"). MO&O ¶¶ 9-14.

The Commission also concluded that the Church violated the FCC's affirmative action requirements for two and one-half years of the seven year license period because KFUD solicited the assistance of likely sources of minority referrals on an "irregular" basis and had not engaged in continual "self-evaluation" of the success of its minority recruitment policies as compared to the availability of minorities in the labor market. See MO&O ¶¶ 5, 29. In addition, the Commission fined the Church \$25,000 for a purported "lack of candor" in a statement describing its recruiting policies embedded in a legal argument. MO&O ¶ 21. The Church appeals from the FCC's rulings that it violated any valid EEO requirement and that it lacked candor, from the EEO reporting requirements and from the forfeiture.

B. The Origin of the Broadcast EEO Rule and the FCC's King's Garden Ruling

In 1964, Congress delegated regulatory authority over discrimination in employment to the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq. (1988 & Supp. V 1993) ("Title VII"). Four years later, the FCC adopted a Memorandum Opinion and Order and Notice of Proposed Rulemaking announcing that the National policy against discrimination embodied in Title VII is fully applicable to broadcasting. Nondiscrimination Employment Practices of Broadcast Licensees, 13 F.C.C. 2d 766 (1968). The first EEO Rule was adopted in 1969. Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C. 2d 240 (1969).

The impetus for the Commission's action in 1968 was the "serious racial crisis" then confronting the Nation. Nondiscrimination Employment Practices of Broadcast Licensees, 13 F.C.C. 2d at 774. The Commission reasoned, "we simply do not see how the Commission could

make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination -- of violating the National policy." Id. at 769. The FCC did not mention "program diversity" as a justification until 1976, when it asserted that its EEO Rule served to ensure that licensees' programming "fairly reflects the tastes and viewpoints of minority groups," quoting dicta from a footnote in the Supreme Court's opinion in NAACP v. Federal Power Comm'n. 425 U.S. 662, 670 n.7 (1976): Nondiscrimination in Employment Practices (Broadcast), 60 F.C.C. 2d 226, 229 (1976), set aside on other grounds sub nom., Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (1977) ("Broadcast Discrimination").

Following further amendments, the FCC's current EEO Rule, 47 C.F.R. § 73.2080, provides in pertinent part: (a) "Equal opportunity in employment shall be afforded by all licensees . . . of commercially or noncommercially operated AM, FM . . . broadcast stations . . . to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex"; and (b) "Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." 47 C.F.R. § 73.2080 (a), (b) (1996).

Under this EEO Rule, the FCC requires any broadcast station that employs five or more full-time employees to develop a written "model" EEO plan. The station must recruit candidates from minority groups for each job opening from a number of minority recruitment sources. Sanctions are levied for unsatisfactory efforts to recruit from minority referral sources or to advertise in minority publications. See Notice of Proposed Rule Making in Streamlining

Broadcast EEO Rule and Policies, 11 FCC Rcd 5154, 5160 (1996) ("Streamlining"). The broadcaster must "recruit . . . [so as to] enhance access by minorities and women to employment opportunities in broadcasting. . . ." Id. at 5158.

The FCC subjects a station's EEO efforts to intensive scrutiny if it fails to meet certain "processing guidelines based on employment statistics." See Broadcasting Nondiscrimination, 60 F.C.C. 2d at 236-39. Under the FCC's guidelines, stations with 11 or more full-time employees are subject to intensive scrutiny if the proportion of minority representation is not at least 50% of that of the "relevant" labor force for both overall and upper level job categories. Streamlining, 11 FCC Rcd at 5160.

The FCC's initial ruling concerning the bearing of its EEO Rule on religious organizations was made in response to a 1971 letter of complaint alleging that King's Garden, Inc. ("King's Garden"), a Christian religious organization and radio licensee, had discriminated against a prospective employee by asking whether he was a Christian. Discriminatory Employment Practices by King's Garden, Inc., 34 F.C.C. 2d 937 (1972). In response, King's Garden referred to Title VII, which at the time exempted religious corporations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its religious activities" 42 U.S.C. § 2000e-1 (This amendment was codified as § 702 of Title VII, Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e-1(a) (1972), and is hereinafter referred to as "Section 702.")

The Commission issued a letter ruling that King's Garden's hiring action discriminated on the basis of religion in violation of the FCC's EEO Rule because the job at issue was not related to the licensee's religious mission. The Commission said: "In keeping with the